A

TIAGARAJA PALANIANDY

v.

MOGANADAS MANIAM & ANOR

B

HIGH COURT MALAYA, PULAU PINANG
VAZEER ALAM MYDIN MEERA JC
[CIVIL SUIT NO: 22-167-2000]
22 JULY 2010

C ***LAND LAW:*** *Indefeasibility of title and interests - Forged transfer - Whether expert evidence conclusive proof of forgery - Whether defendant bona fide purchaser - National Land Code, proviso to s. 340(3)*

CIVIL PROCEDURE: *Trial - No case to answer - Whether there was a submission of no case to answer - Effect of no case to answer -* D *Whether plaintiff's evidence remained uncontroverted and unrebutted*

EVIDENCE: *Expert evidence - Handwriting - Whether expert evidence conclusive proof of forgery - Whether expert evidence corroborated plaintiff's allegation*

E

EVIDENCE: *Burden of proof - Person who alleged fact had to prove it - Whether defendant to prove it was bona fide purchaser for value - Whether defendant succeeded in proving it was bona fide purchaser for value*

F

LEGAL PROFESSION: *Liability as fiduciary - Conflict of interest - Whether conduct of solicitor in land transaction in conflict of interest*

The plaintiff's father was the sole proprietor of a piece of land, whose one half share of land ('said portion') was transferred to G the 1st defendant's father without his knowledge. Subsequently, he discovered that the said portion was sold to the 2nd defendant. The plaintiff claimed that the first transfer was void for forgery and that the subsequent transfer should be set aside accordingly. The plaintiff produced expert evidence to prove that his signatures on H the memorandum of transfer ('MOT') were forged. The 2nd defendant claimed that it was a *bona fide* purchaser for value and relied on the proviso to s. 340(3) of the National Land Code. It submitted that the existence of the sale and purchase agreement and the payment of the purchase price to the 1st defendant's I father proved that it was a *bona fide* purchaser for value.

Held (allowing the plaintiff's claim):

(1) The 1st defendant did not call for evidence at the end of the plaintiff's case. This meant that the 1st defendant had taken the position that there was no case to answer. Therefore, the matter was dealt with on the plaintiff's evidence which remained uncontroverted and unrebutted. (para 19)

(2) Comparison was made between the plaintiff's actual signature and the ones found on the MOT; it was plainly obvious to the court that the signatures attributed to the plaintiff on the MOT were forgeries. The expert evidence was not taken as conclusive proof of forgery, but as corroboration of the plaintiff's claim. (paras 14 & 20)

(3) The plaintiff's solicitor Zulhaimi knew of the forgery allegation. Despite this, he had used the plaintiff's issue document of title to endorse the impugned transfer of the said portion from the plaintiff to the 1st defendant and then endorsed the subsequent transfer to the 2nd defendant. His action was in breach of his fiduciary duty. The fact that he was also the director for the 2nd defendant meant that his actions were in conflict of interest with his duty as a solicitor. (paras 30-33)

(4) The 2nd defendant was taken to have known of the forgery allegation through Zulhaimi who signed the MOT on behalf of it. It had entered into the sale and purchase agreement knowing of the risk involved. During the cross examination, Zulhaimi had testified that he wanted to purchase the plaintiff's land to gain access to the adjourning land owned by the 2nd defendant. This provided motive for Zulhaimi's questionable actions and the risk the 2nd defendant took in purchasing the said portion. (paras 31 & 32)

(5) The 2nd defendant had to prove that it was a *bona fide* purchaser for value. The existence of the sale and purchase agreement and the payment of the purchase price was not the only indicator of a *bona fide* purchaser for value. The court, after considering other salient features surrounding the sale and purchase agreement, held that the 2nd defendant had failed to discharge its burden that it was a *bona fide* purchaser for value. Furthermore, from the totality of the evidence the element of good faith on the part of the 2nd defendant was clearly lacking. (paras 34 & 36)

Case(s) referred to:
Adorna Properties Sdn Bhd v. Boonsoom Bonyanit [2001] 2 CLJ 133 FC ***(refd)***
Abu Bakar Ismail & Anor v. Ismail Husin & Ors & Other Appeals [2007] 3 CLJ 97 CA ***(refd)***
Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***
Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 5 MLJ 136 ***(refd)***
Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***
Chiew Lip Seng v. Perwira Habib Bank Malaysia Bhd [1999] 5 CLJ 112 HC ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***
OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim [1999] 2 CLJ 949 CA ***(refd)***
State Tailor Sdn Bhd v. Nallapan [2005] 2 CLJ 167 CA ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 68, 114(g)
National Land Code, s. 340(2)(b), (3)
Solicitors' Remuneration Order 2005, O. 7

Other souce(s) referred to:
Bar Council Rulings 2008, r. 6.08

For the plaintiff - M Thayalan; M/s Thayalan & Assocs
For the defendant - Jag-Jit Singh; M/s JJ Singh & Assocs
For the 2nd defendant - Faridah Ahmad; M/s Faridah Ahmad & Assocs

Reported by Melinda Robert

JUDGMENT

Vazeer Alam Mydin Meera JC:

[1] The present plaintiff's father, the original plaintiff when this action was filed, the late Palaniandy s/o Pichay Karan ("Palaniandy"), was the sole registered proprietor of a piece of land known as Lot No. 2986, Mukim 12, Daerah Seberang Perai Utara, Butterworth, Pulau Pinang, held under issue document of title No. G.M. 1108 measuring approximately 2.281 acres ("the said land").

[2] Palaniandy and Kathan (father of the original first defendant the late Maniam a/l Kathan ("Maniam")) were brothers. Palaniandy, Kathan and three other brothers were joint tenants in

fee simple of the said land by virtue of a Deed of Conveyance dated 14 July 1922. When the joint tenancy came to an end following the death of four of the five brothers, Palaniandy as the last surviving tenant in fee simple became the sole proprietor of the said land. Accordingly, an issue document of title in the form of a Geran Mukim bearing No. G.M. 1108 was issued on 30 December 1992 wherein "Palainandee s/o K. Peechay Karain" was registered as the sole proprietor. Subsequently on 27 August 1993 by an application made by Palaniandy to the Pentadbir Tanah Daerah Seberang Perai Utara, Butterworth, the spelling of the proprietor's name in the issue document of title was changed from "Palainandee s/o K. Peechay Karain" to "Palaniandy s/o Pichay Karan" to reflect the correct spelling of Palaniandy's name as is in his identity card.

[3] According to Palaniandy (PW1), sometime in 1997 he together with his sons Tiagaraja (PW3), Saravanan, Chandran and a broker by the name of Jamaluddin went to the law office of Zulhaimi & Co where he met the sole proprietor of the law firm, En Zulhaimi bin Ismail (Zulhaimi) (DW1). The purpose of the visit was to discuss the intended sale of the said land to Zulhaimi. The terms of the sale was discussed and Palaniandy agreed to sell the said land to Zulhaimi at the price of RM500,000. Palaniandy was told by Zulhaimi that he would conduct a search at the land office and also prepare the contract of sale. Palaniandy then deposited the original issue document of title to the said land with Zulhaimi for the purpose of the intended sale transaction and left. Palaniandy says that until then the original title had always been in his custody.

[4] Two weeks later Palaniandy again called at the office of Zulhaimi & Co to execute the sale and purchase agreement for the said land. At that second meeting Zulhaimi informed Palaniandy that the land search had revealed that the said land was jointly owned by Palaniandy and Maniam in equal shares. Palaniandy was shocked by this revelation as he had never signed over any transfer of one half of the said land to Maniam. Following that revelation, Palaniandy immediately informed Zulhaimi that he did not want to proceed with the sale of the said land until the matter of Maniam's alleged half ownership was resolved. Palaniandy left without signing the sale and purchase agreement prepared by Zuhaimi. However, the original issue document of title was left remaining in the custody of Zulhaimi in Messrs Zulhaimi & Co.

[5] Palaniandy had obtained from the land office a copy of the Memorandum of Transfer (NLC Form 14A) through which the purported transfer of the one half share of the said land to Maniam was done. Palaniandy was certain that the signature on the Form 14A was not his. Further, until Palaniandy deposited the original issue document of title with Zulhaimi it had always been in the possession of Palaniandy. That original issue document of title showed Palaniandy as the sole registered proprietor of the said land. Palaniandy then retained the services of Messrs Ganesan & Rakan-Rakan, Advocates & Solicitors, to issue a notice to Maniam and to pursue his legal remedies in that regard. Palaniandy's complaint was that the one half ownership transfer to Maniam was fraudulent and obtained by means of forgery.

[6] While that dispute was going on, unknown to Palaniandy, Maniam's disputed half share in the said land was sold and transferred to the second defendant, Masyhur Paragon Properties Sdn Bhd ("Masyhur Paragon") on 15 November 1997. It is important to take note here that Zulhaimi is one of two directors in Masyhur Paragon and the major shareholder holding 249,999 shares while the other director and shareholder holds one share. Zulhaimi had used the issue document of title that had been entrusted to him by Palaniandy to effect the transfer of Maniam's disputed one half share to Masyhur Paragon.

[7] The Plaintiff is claiming that the first transfer from Palaniandy to Maniam is void for forgery pursuant to s. 340(2)(b) of the National Land Code (NLC) which provides that:

> The title or interest of any person or body shall not be indefeasible where registration was obtained by forgery, or by means of an insufficient or void instrument.

[8] The plaintiff is further claiming that the second transfer from Maniam to Masyhur Paragon ought to be set aside as Masyhur Paragon is not a *bona fide* purchaser for valuable consideration. The plaintiff therefore argues that the second transfer ought to be set aside pursuant to s. 340(3) as the title obtained by Masyhur Paragon is not protected by the proviso to s. 340(3) of the NLC.

[9] The main issues to be decided are therefore, two. First, whether the first transfer from Palaniandy to Maniam is void for forgery; and second whether the subsequent transfer from Maniam to the second defendant ought to be set aside for want of *bona fide.*

[10] Let me examine the first issue. It is common ground that Palaniandy was until 27 June 1994 the sole registered owner of the said land. When Palaniandy left the issue document of title with Zulhaimi sometime in 1997 it showed Palaniandy as the sole registered proprietor of the said land. The title now has a fresh memorial endorsement showing that on 27 June 1994 a Memorandum of Transfer was presented at the office of the Pentadbir Tanah Daerah (PTD), Seberang Perai Utara, Butterworth, Pulau Pinang, wherein Palaniandy is said to transfer one half ownership of the said land to Maniam.

[11] A certified true copy of the said Memorandum of Transfer was obtained from the PTD's office on 11 March 1997 and tendered in court (pp. 22-25 of the Common Agreed Bundle of Documents (CABD)). Careful scrutiny of this Memorandum of Transfer reveals the following:

i. The transferor's name is stated as "Palainandee S/O K. Peechay Karain – K.P. No. 3384912". It is pertinent to note here that several years earlier, that is on 27 August 1993, by an application made by Palaniandy to the Pentadbir Tanah Daerah Seberang Perai Utara, Butterworth, the spelling of the proprietor's name in the register of title and the issue document of title had been officially changed from "Palainandee s/o K. Peechay Karain" to "Palaniandy s/o Pichay Karan" to reflect the correct spelling of Palaniandy's name as is in his identity card.

ii. The transferee's name is "Maniam A/L Kathan – KP No. 7822781";

iii. The consideration for the transfer is stated as "Pemberian Secara Kasih Sayang". However, from the evidence adduced in court, there seems to be very little love and affection between Palaniandy and his nephew Maniam. According to SP3 Tiagaraja a/l Palaniandy, Maniam who was claiming that he was entitled to one half of the said land had a running dispute with Palaniandy on that issue.

iv. Both the transferor and transferee are said to have executed the Memorandum of Transfer on 12 April 1994 by putting down their respective signatures before the Penolong Pentadbir Tanah, Seberang Perai Utara, one Zainol Abidin bin A. Rahman as the attesting officer. There is the usual confirmation by the attesting officer in the Memorandum of

Transfer that he attested the signature of "Palainandee s/o K. Peechay Karain – KP No. 3384912". This is strange and suspect when Palaniandy's name in his identity card is spelt as "Palaniandy s/o Pichay Karan". It is standard procedure for any attesting officer to ascertain the identity of the person executing a document by counter checking the name of that person as appearing in the document to be executed against that person's identity card or passport. This obvious misspelling of Palaniandy's name in the Memorandum of Transfer raises suspicion as to whether the attesting officer indeed attested the signature of "Palaniandy s/o Pichay Karan" or someone else. I will allude further on this a little later.

v. In the front page of the Memorandum of Transfer at the signature spot for "Tandatangan oleh pihak pemindah" there is a signature which is said to be Palaniandy's and on the reverse of that page at the signature spot for "Tandatangan oleh penerima pindahan" there appears two signatures, one said to be Palaniandy's and the other Maniam's. There are noticeable differences between the two signatures attributed to Palaniandy on the front and second pages of the Memorandum of Transfer. The obvious dissimilarity between the two signatures again supports plaintiff's contention that those signatures are forgeries.

vi. The stamp duty was paid on 27 June 1994 and on the same day the Memorandum of Transfer was presented for registration at the land office and was duly registered. How that registration of transfer was done by the land office when Palaniandy had possession of the original title is another mystery.

[12] Three years after the first land search, Palaniandy conducted another search at the PTD's office on 15 February 2000 and again extracted a certified true copy of the Memorandum of Transfer as lodged at the PTD's office and the same is found at pp. 26-29 of the CABD. In the second certified true copy of the Memorandum of Transfer, at two places in the second page someone had crossed out the type written name "Palainandee s/o K. Peechay Karain" and in substitution had written in ink the name "Palaniandy s/o Pichay Karan". In between the first and second land searches someone had done these amendments. No evidence was adduced as to who had done this amendment but

this is indeed very disturbing. A statutory instrument, in this case, the Memorandum of Transfer, which had been lodged with the PTD's office has been tempered with after registration whilst the same was in the control and custody of the land office. The amendments to the name were a crude attempt to rectify the patent defects on the Memorandum of Transfer and it lends credence to the plaintiff's claim that Palaniandy did not sign on the Memorandum of Transfer and that Palaniandy's signatures therein are forgeries. Obviously, the perpetrators of the forgery had not realised that the registered proprietor's name had been changed from "Palainandee s/o K. Peechay Karain" to "Palaniandy s/o Pichay Karan" several years earlier. Thus, the ill conceived and clumsy attempt to rectify the obvious flaws in the Memorandum of Transfer.

[13] Upon the plaintiff's application, this court had ordered that the Memorandum of Transfer be sent to a Document Examiner at the Chemistry Department for his expert opinion as to the authenticity of Palaniandy's signature on the document. Accordingly, the Memorandum of Transfer was examined by PW2 Wong Kong Yong who gave a report which was tendered to court and is found at p. 1 of CABD2. PW2 found that there were dissimilarities in the characters between Palaniandy's actual signatures (as found in several other comparative documents signed by Palaniandy) when compared to Palaniandy's purported signatures in the Memorandum of Transfer. PW2 therefore concluded that the signatures on the Memorandum of Transfer attributed to Palaniandy is probably not the signature of the maker of the sample signatures in the comparative documents. In short, PW2's conclusion was that the signatures on the Memorandum of Transfer were probably not Palaniandy's.

[14] The learned counsel for the first defendant submits that PW2 in his report as well as oral evidence in court had used the words "kemungkinan bukan tandatangan sebenar penulis contoh-contoh tandatangan" and therefore PW2's evidence is not conclusive proof that Palaniandy's signatures on the Memorandum of Transfer are forgeries. I agree that ordinarily expert evidence in this regard cannot be conclusive. PW2 himself has explained this in cross examination. Since PW2 did not witness the actual execution of the impugned and questioned signatures, he can only express his opinion in terms of probabilities based on characteristic

differences that he has observed. What is of more importance and relevance here is that PW2 did not state that in his opinion the maker of the disputed signatures in the Memorandum of Transfer and the comparative samples were the same person. I must say that any expert opinion can only assist the court in arriving at its own conclusion and findings. The question of forgery is a question of fact to be decided by the court. In this case, even an untrained person would conclude that the signatures attributed to Palaniandy in the Memorandum of Transfer are definitely different from those found in the other contemporaneous documents signed by Palaniandy. I too find that the signatures attributed to Palaniandy on the Memorandum of Transfer are different from Palaniandy's signatures on other contemporaneous documents.

[15] Further, both learned counsel for the first and second defendants have submitted that the plaintiff ought to have called Zainol Abidin bin A. Rahman, the Penolong Pentadbir Tanah Daerah Seberang Perai Utara, the attesting officer in the Memorandum of Transfer as a witness to prove non-execution by Palaniandy. The learned counsel for the first defendant submits that the non calling of Zainol Abidin bin A. Rahman ought to be construed against the plaintiff and that adverse inference under s. 114(g) of the Evidence Act ought to be invoked against the plaintiff. The said Zainol Abidin bin A. Rahman was originally named as the third defendant in the present suit. Subsequently, the plaintiff applied to amend the Writ to name the Penang State Government as the third defendant in place of Zainol Abidin bin A. Rahman. That application was allowed by the court. Later, the Penang State Government applied to strike out the plaintiff's claim on the grounds that the pleadings did not disclose any reasonable cause of action against the Penang State Government. That application was supported by an affidavit affirmed by the original third defendant Zainol Abidin bin A. Rahman. The plaintiff consented to that application and the Penang State Government was removed as a defendant in the suit.

[16] The learned counsel for the second defendant has now taken issue with the plaintiff on this and submits that if indeed there was forgery then the plaintiff should not have consented to the removal of the Penang State Government as a party to the suit. The learned counsel for the plaintiff in reply submits that the abandonment of the claim against the Penang State Government

does not mean that plaintiff's allegation of forgery against the first defendant is compromised. Plaintiff's counsel further submits that when faced with the striking out application by the Penang State Government, the plaintiff consented to the application as indeed the pleadings did not disclose a cause of action against the Penang State Government. I have perused the affidavit filed by Zainol Abidin bin A. Rahman in support of the striking out application and find that there is no averment by him to the effect that Palaniandy indeed signed the Memorandum of Transfer in his presence or that he had witnessed the due execution of the said document. If there had been such an averment and the plaintiff had conceded to the striking out application in the face of such averment, then the counsel's argument would have some basis. But that is not the case here and I find that the abandonment of the plaintiff's claim against the Penang State Government does not have any bearing on the plaintiff's claim against the first and second defendants.

[17] Now coming back to the issue of the non calling of Zainol Abidin bin A. Rahman. Palaniandy has categorically stated in evidence that he did not execute the Memorandum of Transfer. The plaintiff's case is that the signatures attributed to Palaniandy on the Memorandum of Transfer are forgeries. The plaintiff has adduced expert evidence which supports the plaintiff's contention that those signatures are forgeries. Therefore, the learned counsel for the plaintiff submits that the burden is on the first defendant to prove due execution of the Memorandum of Transfer as it is the first defendant who is asserting that the signatures on the Memorandum of Transfer are that of Palaniandy. Plaintiff's counsel submits that the plaintiff need not call Zainol Abidin bin A. Rahman as witness. Plaintiff's counsel further submits that the evidential burden to prove due execution rests on the first defendant and that it is in the first defendant's interest to call Zainol Abidin bin A. Rahman to prove execution by Palaniandy.

[18] In this regard plaintiff's counsel has referred to the High Court decision of *Chiew Lip Seng v. Perwira Habib Bank Malaysia Bhd* [1999] 5 CLJ 112. The plaintiff in that case had claimed that the charge of his property to the defendant was done without his knowledge and that the signature on the charge attributed to him was a forgery. The defendant argued that the plaintiff had failed to call the attesting officer to prove that he did not sign the

charge. The High Court held that it was for the defendant to prove due execution when the plaintiff alleges forgery and that it was the duty of the defendant to call the attesting officer to testify. The following passages from the judgment of NH Chan J (as he then was) in *Chiew Lip Seng v. Perwira Habib Bank Malaysia Bhd* is of relevance here.

> Here the plaintiff denies that the charge was executed by him. Section 68 of the Act provides that for the purpose of proving the execution of a document required by law to be attested, which is the charge in the present case, the attesting witness has to be called. **It seems to me that that throws the onus on the defendant who has to prove that the charge was executed by the plaintiff.** (emphasis added)

For ease of reference I will now reproduce s. 68 of the Evidence Act 1950 referred to in the above judgment, which reads:

> If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence.

There is no doubt that the signatures of the transferor and transferee on the Memorandum of Transfer are required by law to be attested by any one of the authorized attesting officers. Since the first defendant is arguing due execution, the onus is therefore clearly on the first defendant to prove that the Memorandum of Transfer was lawfully executed by Palaniandy. To my mind it is the first defendant who should have called Zainol Abidin bin A. Rahman to court as the attesting witness of that document.

[19] When the plaintiff closed his case, the first defendant did not call evidence. In fact, the first defendant's learned counsel was not present in court on the day when the plaintiff closed his case and ever since. The court was informed by the learned counsel for the second defendant that the first defendant's counsel was attending court elsewhere and that the first defendant had elected not to call any witness. The effect of that was that the first defendant's counsel had taken the position that there was no case for the first defendant to answer. In fact that was the thrust of the first defendant's submission to this court. That being so, as

between the plaintiff and the first defendant the matter must be dealt with on the evidence as it stands and the only evidence that stands is the evidence of the plaintiff and his witnesses. That is the principle of law which was reiterated by the then Supreme Court in the case of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 where Gopal Sri Ram JCA (as he then was and sitting in the Supreme Court) held that:

> For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

The fact that the original first defendant, Maniam, had died before the trial did not preclude his personal representative who has been substituted for Maniam from calling Zainol Abidin bin A. Rahman as his witness to prove due execution of the Memorandum of Transfer. That failure means that the plaintiff's evidence stands uncontroverted and unrebutted.

[20] Palaniandy's evidence is corroborated by the Document Examiner's (PW2) evidence. Further it is plainly obvious even to the untrained naked eye that the signatures attributed to Palaniandy on the Memorandum of Transfer are crude forgeries. I find PW1, PW2 and PW3 are witnesses of truth. Therefore, from the totality of the plaintiff's evidence I find that the Memorandum of Transfer dated 12 April 1994 is a forgery.

[21] Now having made the finding that the Memorandum of Transfer is a forgery, what then is its effect in law *vis-à-vis* the plaintiff and the defendants? The Court of Appeal in the case of *OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 2 CLJ 949 in answering a similar question had this to say in the words of NH Chan JCA:

> In *Chiew Lip Seng v. Perwira Habib Bank (M) Bhd*, the registration of the charge was obtained by forgery of the charge instrument and that made the registered interest, namely, the charge, defeasible under s. 340(2)(b).
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> Dr David Wong in *Tenure and Land Dealings* in the Malay States, at p 361, says:
>
> > Forgery as a ground for vitiating a registered title, as set out in s. 340(2)(b) of the Malaysian National Land Code, marks a focal point of difference between the Malaysian Torrens system and those where *Frazer v. Walker* [1967] 1 AC 569 applies.

A And at p 362, he goes on to say:

> It will be realised that 'forgery' under the Malaysian provision is a distinct ground on its own. The Singapore Land Titles Act (Cap 276), also expressly sets out 'forgery' as an exception to indefeasibility, but places 'forgery' side by side with 'fraud' subject to the same limitation, *viz* that for a registered title to be vulnerable in either case the proprietor (or his agent) must be a party to or have colluded in the 'fraud' or 'forgery'. This would appear to treat forgery as a species of fraud. Under the Malaysian provision, the very fact of forgery suffices by itself in making a registered title defeasible irrespective of the absence of knowledge or implication on the part of the proprietor. In other words, it affects the immediate proprietor even if he be an innocent purchaser for value.

In s. 340(2)(b) there is no similar limitation as in s. 340(2)(a) for the immediate proprietor, chargee or lessee to be party or privy to the 'forgery' before the registered title or interest becomes defeasible. In s. 340(2)(b) the word 'forgery' is not to be equated with the word 'fraud'. In other words, in the context of sub-s (2)(b) 'forgery' is not in the same category as 'fraud' and the limitation in s. 340(2)(a) that for a registered title to be vulnerable, the immediate proprietor, chargee or lessee must be a party to or has colluded in the 'fraud' does not apply to 'forgery' in s. 340(2)(b). In this country, under the provision of s. 340(2)(b), the very fact of forgery suffices to make a registered title or interest (such as a charge or lease) defeasible irrespective of the absence of knowledge or implication of the immediate proprietor, chargee or lessee. In effect s. 340(2)(b), to use the words of Dr David Wong: 'affects the immediate proprietor (chargee or lessee) even if he be an innocent purchaser for value'. (emphasis added)

[22] Therefore, a forged instrument is an insufficient or void instrument. The effect of a void instrument was aptly described by Gopal Sri Ram JCA in *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17 at 44 in the following words:

> ... If on the facts of a given case, it is demonstrated to the satisfaction of the court that the particular instrument was forged, or was, for some reason, insufficient or void, then, the title of the registered proprietor may be set aside.

> … it is axiomatic that a forged instrument is null and void and of no effect (see *Kreditbank Cassel GMBH v. Schenkers Ltd* [1927] 1 KB 826 at p 834, per Bankes LJ). It is not merely voidable. In the absence of an express statutory direction to the contrary, no rights whatsoever arise in favour of one who acquires title under a void instrument. …

Further down at the same page Gopal Sri Ram JCA added that:

> … Defeasibility is occasioned in this instance because a forged instrument is a nullity, incapable of conferring any right, interest of title in favour of the acquirer of immovable property.

[23] The Memorandum of Transfer dated 12 April 1994 is a void instrument and the registration of the transfer of the one half share of the said land to Maniam is void. Therefore, Maniam's title is defeasible pursuant to s. 340(2)(b). The Federal Court's recent landmark decision in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 reversing its earlier decision in *Adorna Properties Sdn Bhd v. Boonsoom Bonyanit* [2001] 2 CLJ 133 and putting to rest the ghost of *Adorna Properties* again reiterates this principle. In that case the appellant's land had been charged by the first respondent to one of the other respondents purporting to act under a power of attorney which the appellant denied having executed. The appellant sought a declaration that the charges were *void ab initio*. The Federal Court held that once the court is satisfied that the charges arose from void instruments, it automatically follows that they are liable to be set aside at the instance of the registered proprietor, namely the appellant in that case. The learned Zaki Tun Azmi CJ in *Tan Ying Hong v. Tan Sian San & Ors* had this to say about s. 340 of the NLC.

> I would like to look at s. 340 of the NLC in a more simplified manner.
>
> Let us refer to the first owner of a piece of land as "A" who then transfers the same piece of land to "B" and which subsequently is transferred to "C".
>
> As far as s. 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short if A's name appears on the registration, no one can come and claim for that title. The law will not entertain it at all.

A Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or anyone else to which he was a party or privy then his claim to the title or interest can be defeated. (See s. 340(2)(a) of the NLC). Otherwise B stands in the same position as A.

B

The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is the same (see s. 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has good title. In this C *latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument.*

The third instance where B's title or interest could be defeated is where it was unlawfully acquired through the exercise of any power or authority conferred by any law. Section 340(2)(c) of the D NLC deals with one who was for example acting in his capacity as an agent to a power of attorney. *Even if C is in the same position as B, subsection (3) does not give protection to C unless he can show that he had acquired the title in good faith and for valuable consideration. Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in* E *good faith and for valuable consideration.* This is what is called deferred indefeasibility of title. *If his title or interest is challenged on similar grounds, the burden of proving there was valuable consideration and good faith lies on him.* (emphasis added).

F **[24]** In our case, the second defendant finds himself in the position of "C" above. The plaintiff is also challenging the subsequent transfer of the one half share from Maniam to the second defendant. Therefore, it is now incumbent upon the second defendant to prove that the second defendant is a *bona* G *fide* purchaser for valuable consideration.

[25] The second defendant has pleaded in its defence that it is a *bona fide* purchaser for value. In construing the meaning of the term "*bona fide* purchaser" the Court of Appeal in the case of *State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167 at 184 held H that:

The term "*bona fide* purchaser" has been used in a host of cases. Simply put it means a buyer in good faith. And the basic element of good faith is the absence of fraud, *deceit* or dishonesty and the I knowledge or means of knowledge of such at the time of entry into a transaction. But the overriding consideration is "the

particular circumstance of each case". (See *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 AMR 169; [1998] 1 MLJ 465; *Ong Ban Chai @ Ong Kah Liew & 3 Ors v. Seah Siang Mong* [1998] 3 AMR 2673; [1998] 3 MLJ 346)

[26] Let me now assess the evidence relating to the second transfer to ascertain if the second defendant had in the particular circumstance of this case discharged its burden and whether there is "absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction". I shall now recap the events prior to and post registration of the transfer from Maniam to the second defendant. Sometime in 1997 Palaniandy had called at the office of Zulhaimi & Co together with his sons and a broker by the name of Jamaluddin with the intention of negotiating a sale of the said land to Zulhaimi. Palaniandy then deposited the original issue document of title to the said land with Zulhaimi to facilitate the preparation of the sale and purchase agreement. The draft sale and purchase agreement identifies the second defendant as the purchaser and stipulates the purchase price as RM500,000. The draft sale agreement also identifies Messrs Zulhaimi & Co as the second defendant's solicitors and Messrs Ganesan & Rakan-Rakan as Palaniandy's solicitors. Two weeks later Palaniandy again called at Zulhaimi's office only to be told that the land search had revealed that Maniam is one half owner. The intended sale of the said land was then aborted. The plaintiff contends that when Palaniandy was first told by Zulhaimi that the land search had revealed Maniam as half owner of the said land, Palaniandy had immediately informed Zulhaimi that he had never transferred one half share to Maniam and that there is some kind fraud involved. Further, Palaniandy had informed Zulhaimi that he did not want to proceed with the intended sale of the said land to the second defendant until the issue of Maniam's half ownership is resolved and set right. This is confirmed by PW3 Tiagaraja a/l Palaniandy who had followed Palaniandy to Zulhaimi's office. This evidence is not challenged nor denied by Zulhaimi or the second defendant.

[27] Sometime in May 1997 two events had taken place. The first is that by a sale agreement dated 16 May 1997 the second defendant had agreed to purchase from Maniam the disputed one half of the said land for RM215,000. The agreement for this sale was prepared by Messrs Zulhaimi & Co who acted as solicitors

for both the vendor and purchaser. The said agreement and Memorandum of Transfer for this sale was executed in part by Zulhaimi as a director of the second defendant.

[28] The second event as narrated by Palaniandy in his evidence is that his son Chandran had informed him that the issue of Maniam's half ownership had been resolved and that it was now in order for Palaniandy to execute the agreement to sell the said land. Palaniandy says that based on that representation he signed an agreement to sell the said land to the second defendant. That sale and purchase agreement dated 27 May 1997 was prepared by the firm of Messrs Zulhaimi & Co who were representing both Palaniandy as vendor and the second defendant as purchaser. No explanation has been given as to why Messrs Ganesan & Rakan-Rakan were no longer Palaniandy's solicitors in this sale transaction. It is evident that Palaniandy did not get independent solicitor's advice. The sale agreement states that Palaniandy was selling his half share of the said land to the second defendant and not the whole. When asked to explain this, Palaniandy says that in his mind he was always of the impression that he was selling the whole of the land. Apart from the initial deposit of RM28,500 paid to Palaniandy, the balance purchase price was never paid and a dispute arose between Palaniandy and the second defendant. Palaniandy subsequently retained the services of Messrs Thiru Chandran & Partners as solicitor to represent him in that transaction. Following that the second defendant appointed Messrs Faridah Ahmad & Associates as its solicitor. A series of exchange of correspondence then ensued between Messrs Thiru Chandran & Partners and Messrs Faridah Ahmad & Associates. The final result of it was that the sale agreement dated 27 May 1997 between Palaniandy and the second defendant came to an end. Nevertheless, the original issue document of title to the said land remained in the hands of Zulhaimi.

[29] Now, in the meantime, Zulhaimi had without any authorization from Palaniandy and knowing very well that there is an ongoing dispute between Palaniandy and Maniam as regards the one half share, presented at the PTD's office the original issue document of title together with a Memorandum of Transfer executed by Maniam in favour of the second defendant to register the transfer of the disputed one half share to the second defendant. The transfer was registered by the PTD on 15 November 1997.

[30] It is pertinent to note here that Zulhaimi in cross examination had admitted that when Palaniandy gave him the issue document of title, the title only had two memorial endorsements on it. First endorsement was the proprietor's name "Palainandee s/o K. Peechay Karain" which had been crossed out and the second endorsement was the change of proprietor's name from "Palainandee s/o K. Peechay Karain" to "Palaniandy s/o Pichay Karan (KP. 3384912)" dated 27 August 1993. At that point in time, Maniam's purported half ownership was not endorsed on the issue document of title. However, when Palaniandy got back the original issue document of title from Zulhaimi following a High Court Order, there were three other new endorsements on the title. The first additional endorsement was the transfer of the whole land from "Palainandee s/o K. Peechay Karain" to "Palaniandy s/o Pichay Karan – 1/2 share" and "Maniam a/l Kathan – 1/2 share" dated 27 June 1994. The second additional endorsement was a private caveat dated 27 October 1997 lodged by "Masyhur Paragon Properties Sdn Bhd", the second defendant. The third additional endorsement was the transfer of "Maniam a/l Kathan – 1/2 share" to "Masyhur Paragon Properties Sdn Bhd – 1/2 share" dated 15 November 1997. When Palaniandy entrusted the custody of the issue document of title to Zulhaimi as his solicitor, it was for the purpose of the intended sale of the said land by Palaniandy to the second defendant. Therefore, Zulhaimi's act of using the issue document of title to endorse the impugned transfer of the half share from Palaniandy to Maniam and then to further endorse Maniam's transfer of the half share to the second defendant is a clear breach of fiduciary duty by Zulhaimi. This is compounded by the fact that Zulhaimi had full knowledge of the dispute between Palaniandy and Maniam. Further, Palaniandy had informed Zulhaimi that he had never transferred half share of the said land to Maniam and that he suspects fraud in that transfer. Zulhaimi had full knowledge of the forgery allegation by Palaniandy and yet proceeded to transact the sale of Maniam's impugned half share in the said land to the second defendant.

[31] I must also consider another disturbing feature in this case. Zulhaimi has played many different roles in this sad affair. Palaniandy first met Zulhaimi as the intended purchaser of the said land. Subsequently, Zulhaimi & Co, of which Zulhaimi is the sole proprietor had acted as Palaniandy's solicitor in the sale and

purchase agreement between Palaniandy and the second defendant. Zulhaimi & Co also acted as the solicitor for both Maniam and the second defendant in the sale and transfer of Maniam's disputed half share to the second defendant. Zulhaimi is also one of two directors of the second defendant as well as the owner of all but one share in the second defendant. In fact Zulhaimi signed the sale agreement with Maniam as director of the second defendant and executed the Memorandum of Transfer for the second defendant. Therefore, for all intents and purposes the second defendant company was Zulhaimi's company and Zulhaimi was its alter ego. Zulhaimi's knowledge of the allegation of forgery whether obtained as solicitor for the various parties to the transactions or as director of the second defendant can therefore be imputed to the second defendant not merely as its agent but also as principal. (Please see the decision of Gopal Sri Ram CJA in the case of *Abu Bakar Ismail & Anor v. Ismail Husin & Ors & Other Appeals* [2007] 3 CLJ 97 at p. 113 for the proposition that "the master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not".)

[32] The second defendant knowing well the inherent risk had entered into the agreement to purchase Maniam's disputed half share fully aware of its possible consequences. There is clear conflict of interest by Zuhaimi against a duty arising from a fiduciary relationship. Zulhaimi in fact agreed in cross examination that he was in a position of conflict of interest in wearing many different hats in this transaction. Zulhaimi had confirmed in cross examination that he needed the said land in order to get access to an adjoining piece of land owned by the second defendant. This provides the motive for Zulhaimi's questionable actions and the risk that the second defendant took. The second defendant is the author of its own misfortune.

[33] Counsel for the second defendant submits that Zulhaimi did not attest the signature of Palaniandy or Maniam and therefore he is not in conflict of interest. Here I must point out two rules governing professional conduct of solicitors. The first is O. 7 of the Solicitors' Remuneration Order 2005 which provides that:

(1) In any transaction referred to in the First, Second, Third and Fourth Schedules, a solicitor shall not act for more than one party in a particular transaction.

(2) Notwithstanding subparagraph (1), a solicitor may, where there is no conflict of interest, prepare, file or witness the miscellaneous documents specified in the Fifth Schedule for another party to the transaction.

The First Schedule to the Solicitors' Remuneration Order 2005 refers to sale and transfer of real property. The second relates to Rule 6.08 of the Bar Council Rulings 2008 on conflict of interest. Rule 6.08 reads:

> An advocate and solicitor who is a director or substantial shareholder (as defined in the Companies Act 1965) of a company shall not act for the other party to any transaction in which the company is a party.

There is clear breach of these two rules by Zulhaimi as his law firm of which he is the sole proprietor had acted for Palaniandy as well as Maniam in the two sale transactions. This does not auger well in construing whether the second defendant is a *bona fide* purchaser.

[34] Counsel for the second defendant argues that the existence of the sale and purchase agreement and the payment of the purchase price to Maniam proves that the second defendant is a *bona fide* purchaser. I must respectfully disagree with that contention. In *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526 Raus Sharif JCA (as he then was) had made the following remarks in answer to a similar contention by a defendant in that case:

> I will now examine learned trial judge's reasoning in holding that the first defendant was a *bona fide* purchaser for valuable consideration. One of the reasons given was that the sale and purchase agreement speaks for itself. To the learned trial judge, the first defendant was a *bona fide* purchaser and had given valuable consideration because of the existence of the sale and purchase agreement and the purchase price had been paid in full. With respect such reasoning is seriously flawed. An existence of a sale and purchase agreement and the payment of the purchase price in full cannot be the only indicator to show whether a person is a *bona fide* purchaser or otherwise. Other salient features surrounding the sale and purchase agreement must be considered.

[35] The learned counsel for the second defendant also submits that in the course of another court proceeding where Palaniandy had sued the second defendant for the return of the issue document of title, Palaniandy in an affidavit filed in that proceeding had averred the following:

> Saya juga dinasihati dan mempercayai bahawa permohonan ini tidak akan memudaratkan Responden kerana haknya sebagai tuanpunya sebahagian lagi atas tanah tersebut tidak akan terjejas.

This according to the learned counsel for the second defendant is an admission by Palaniandy of the second defendant's lawful ownership of the half share in the said land, and therefore, the plaintiff is estopped from raising the issue of forgery in the first transfer or the second defendant's ownership arising from the second transfer. Now let me consider this argument in the light of Palaniandy's application to the High Court in that case. By that application, Palaniandy had asked for the return of the issue document of title from the second defendant so that he can transfer his existing share in the said land to his children because of his advancing age and frail health. The above averment taken in that context merely means that Palaniandy wanted the return of the issue document of title to facilitate the transfer of his existing share without interfering in the half share registered in the second defendant's name. This present suit was ongoing at time and Palaniandy's statement cannot by any stretch of imagination be construed as an admission by Palaniandy that the second defendant is the rightful owner of half of the said land. In fact in that very affidavit Palaniandy avers that the second defendant had demanded that Palaniandy agrees to the partition and division of the said land into two halves between Palaniandy and the second defendant as a condition for the release of the title, which demand was rejected by Palaniandy. Therefore, taken in its context, the averment by Palaniandy relied on by the second defendant as giving rise to issue estoppel is misconceived.

[36] As explained earlier, the second defendant bears the evidential burden of proving that it was a *bona fide* purchaser for value. (Please also see the Court of Appeal decisions in *Abu Bakar Ismail & Anor v. Ismail Husin & Ors & Other Appeals* [2007] 3 CLJ 97 at pp. 113-115 and *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526 at pp. 553-556). In the premise

of the foregoing and having considered all the salient features surrounding this case, I am of the opinion that the second defendant has failed to discharge its burden that it is a *bona fide* purchaser. In fact from the totality of the evidence, the element of good faith on the part of the second defendant is conspicuously absent. Therefore, the transfer of the one half share in the said land from Maniam to the second defendant ought to be set aside pursuant to s. 340(3) as the title obtained by the second defendant is defeasible and is not protected by the proviso to s. 340(3) of the NLC.

[37] Wherefore, I order that:

(a) the transfer of 1/2 share in Lot No. 2986, Mukim 12, Daerah Seberang Perai Utara, Butterworth, Pulau Pinang, held under Geran Mukim No 1108 dated 15 November 1997 from Maniam a/l Kathan to the second defendant be set aside;

(b) the registration of the second defendant as the registered owner of 1/2 share in Lot No. 2986, Mukim 12, Daerah Seberang Perai Utara, Butterworth, Pulau Pinang, held under Geran Mukim No 1108 be cancelled;

(c) the plaintiff shall be registered as the registered owner of 1/2 share in Lot No. 2986, Mukim 12, Daerah Seberang Perai Utara, Butterworth, Pulau Pinang, held under Geran Mukim No 1108;

(d) the Pentadbir Tanah Daerah Seberang Perai Utara, Pulau Pinang, shall give effect to this Order;

(e) cost shall be borne by the first defendant and the second defendant severally.